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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-10

EXXON CORPORATION and
PHILLIPS PETROLEUM COMPANY, *Appellants*
v.
GOVERNOR OF THE STATE OF MARYLAND, et al., *Appellees*

No. 77-11

SHELL OIL COMPANY, *Appellant*
v.
GOVERNOR OF THE STATE OF MARYLAND, et al., *Appellees*

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CONTINENTAL OIL COMPANY, et al., *Appellants*
v.
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No. 77-47

GULF OIL CORPORATION, *Appellant*
v.
GOVERNOR OF THE STATE OF MARYLAND, et al., *Appellees*

No. 77-64

ASHLAND OIL, INC.
COMMONWEALTH OIL REFINING COMPANY, INC.
AND PETROLEUM MARKETING CORPORATION, *Appellants*
v.
GOVERNOR OF THE STATE OF MARYLAND, et al., *Appellees*

[Counsel Listed Inside Cover]

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On Appeal From The
Court of Appeals of Maryland

MOTION OF NATIONAL CONGRESS OF PETROLEUM RETAILERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

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MOTION OF THE NATIONAL CONGRESS OF PETROLEUM RETAILERS FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

The National Congress of Petroleum Retailers ("NCPR") hereby moves, pursuant to Supreme Court Rule 42, for leave to file a Brief *amicus curiae* in support of Appellees. This Motion is necessitated by the refusal of certain of the Appellants to consent to the filing of the appended Brief.

The interests of *amicus curiae* NCPR is set forth in detail in its Brief. To summarize, NCPR represents approximately 80,000 independent branded gasoline dealers through approximately 48 affiliates throughout the United States, including an affiliate in the State of Maryland. One of the purposes of NCPR, as set forth in its By-Laws, is to represent and act on behalf of independent branded gasoline dealers throughout the United States in matters directly affecting their business interests.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157e (1972), repl. vol., (1976 Cum. Supp.), does not violate, *inter alia,* the Commerce Clause of the United

States Constitution (Art. I, § 8, Clause 3), is of obvious significance to our member independent gasoline dealers.

During the last four years, the legislatures of some 33 jurisdictions have adopted, considered, or had as pending business, proposals which are similar to the Act at issue here. Thus, the decision of this Court in this action will have a direct and vital impact on the relationship of all independent branded gasoline dealers with their franchiser-suppliers. This impact will be felt not only by independent branded gasoline dealers in the State of Maryland, but by dealers in the other states as well.

NCPR has developed a reservoir of information and legal background relevant to the issues which this Court is being called upon to decide. It particularly believes that its practical expertise and its overall familiarity with the hearings and reports of both state and federal legislatures, will allow it to materially assist this Court at arriving at a decision in this matter.

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On Appeal From The
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BRIEF OF THE NATIONAL CONGRESS OF PETROLEUM RETAILERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST

The National Congress of Petroleum Retailers (hereinafter "NCPR") is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 2021 K Street, N.W., Washington, D.C. 20006.

NCPR represents approximately 80,000 independent branded gasoline dealers through approximately 48 affiliates throughout the United States including an affiliate in the State of Maryland.

One of the purposes of NCPR, as set forth in its By-Laws, is to represent and act on behalf of independent branded gasoline dealers throughout the United States in matters directly and indirectly affecting their business interests.

The determination of the Court of Appeals of Maryland that the Motor Fuel Inspection Law, codified in the Maryland Annotated Code (1957), Art. 56, § 157e (1972), repl. vol., (1976 Cum. Supp.), does not

violate, *inter alia*, the Commerce Clause of the United States Constitution (Art. I, § 8, Clause 3), is of obvious significance to our member independent gasoline dealers.

During the last four years, the legislatures of some 33 jurisdictions have adopted, considered, or had as pending business, proposals which are markedly similar, if not identical, to the Act at issue here. Thus, the decision of this Court in this action will have a direct and vital impact on the relationship of all independent branded gasoline dealers with their franchiser-suppliers. This impact will be felt not only by independent branded gasoline dealers in the State of Maryland, but by dealers in the other states as well.

ARGUMENT

THE DIVORCEMENT REQUIREMENT EMBODIED IN PARAGRAPHS (B) AND (C) OF THE "MARYLAND ACT" IS A NECESSARY AND CONSTITUTIONALLY VALID EXERCISE OF STATE AUTHORITY

A. Introduction

Appellants constructed and urged upon the Maryland Court of Appeals a multiplicity of purported Constitutional arguments as apparent support for their attack, albeit unsuccessful, upon the validity of Paragraphs (B) and (C) of the Maryland Fuel Inspection Law, as amended (the "Maryland Act"). Appellants here have abandoned all grounds for their appeal from Paragraphs (B) and (C) except as to their constitutionality under the Commerce Clause (Art. I, S8, Clause 3). Therefore, this amicus brief will deal only with that question.

The general proposition is clear that the Federal judiciary is hesitant to interfere in State economic regulation except where there is a clear burden placed on interstate commerce and that burden outweighs the value of the State's reason for attempting regulation,[1] or where discrimination is made against outsiders.[2]

Paragraphs (B) and (C) of the Act are clear in their command: they prohibit only the *operation* of service stations by producers and refiners of petroleum products. They do not prohibit ownership of outlets by Appellants nor inhibit Appellants' right to obtain additional outlets. It cannot be too strongly emphasized that functional divorcement, *not* divestiture, is all that is required by the Act. The only practical effect of the Act, therefore, is to prohibit Appellants from engaging in vertical price maintenance or price fixing at their retail outlets.

B. Paragraphs (B) And (C) Of The Maryland Act Do Not Discriminate Against Interstate Commerce.

Despite the broad and imprecise statements in Appellants' briefs, Paragraphs (B) and (C) of the Act simply do not discriminate against interstate commerce. These Paragraphs in fact require only one change in the method by which refiners or producers can market their gasoline product at retail. They state simply that the retail outlets owned by refiners or producers must be operated by an independent dealer.

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[1] See *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freightlines, Inc.*, 359 U.S. 520 (1959); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440, 443 (1960).

[2] *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349 (1951).

There are, of course, only two primary means by which a retail station can be operated. The first is by an independent dealer; the second is by a company employee or agent. In the case of the major brand refiners and producers (hereinafter referred to as "Majors") operating in the State of Maryland, approximately ninety-two percent of their stations already are operated by independent retail dealers. The Act does nothing more, or nothing less, than require that where a station is presently being operated by a company employee, the company employee must either be converted to a retail dealer or a retail dealer must be substituted for the company employee.

The essential requirement of Paragraphs (B) and (C) of the Act, therefore, relates to the operation of stations in which either the ownership or the underlying leasehold interest rests with Appellants. There is nothing in the Act which requires that the retail dealer be a resident of the State of Maryland. Each Appellant remains as free to reach outside of the state to obtain its retail dealers in the future as it has been to obtain its company employees in the past. There is no geographical limitation on any Appellant's discretion in obtaining the retail dealers utilized in operating their stations.

The Act is devoid of any language whatsoever which in any way discriminates against any outside interest relating to the subject matter of the Act in favor of local interests.

The principal difference between a company employee-operated station and a dealer-operated station is that the dealer operates under a lease and dealer agreement which sets forth the terms and conditions

under which he may operate that station.[3] This is not dissimilar from the instructions which are given to the employee who is operating a dealership.

The lack of discrimination can be clearly demonstrated as the Act requires no change in the personnel who are, in fact, operating the Appellant operated stations presently, and the personnel who could operate the stations under the challenged Act. The Appellants need only allow the present employee operator to substitute for his employment relationship a dealer supply and lease agreement. They then could continue to operate the stations with the same personnel as they have in the past. There is only one difference. With a dealer operator, Appellants may not legally fix the retail price of gasoline which they sell in their stations.

This difference, and this difference alone, is both the discrimination and burden which Appellants claim. As Appellants have presented it, the real question which they ask this Court to decide is whether the Commerce Clause gives them a Constitutional right to fix the prices of gasoline sold in retail outlets which they supply and own.

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[3] The Dealer lease and Dealer agreement generally are dependent each on the other and are executed simultaneously. Courts generally have treated them as a single agreement in the nature of a franchise agreement and have applied franchise law in interpreting them. See *Shell Oil Co.* v. *Marinello*, 1972 Trade Cases ¶ 74,178.

Additionally, such agreements are exclusionary in the sense that the dealer is required to purchase gasoline only from his lessor-supplier.

C. Paragraphs (B) and (C) of the Act Do Not Impose Any Burdens On Interstate Commerce

Appellants argue that Paragraphs (B) and (C) of the Act, as applicable to each of them, place a significant burden on interstate commerce.

Although the Majors devote some twenty-two pages of their brief in apparent support and documentation of the magnitude of the Act's effects upon them, as Appellant Ashland correctly points out in its Brief:

> "The prohibition against refiner operation of retail service stations will have little effect on the major brand stations the vast majority of which are operated by dealers." *Id.*, at 15.

Indeed, as pointed out by the Majors in their own Brief, only eight percent of their Maryland stations are presently operated by company employees.

The principal arguments advanced by the Majors are that by virtue of Paragraphs (B) and (C) of the Act interstate commerce will be significantly burdened because they will be denied the opportunity for experimentation regarding new and different methods of marketing gasoline, and, thus, that the "flow of petroleum products and capital into Maryland" will be obstructed. Both assertions are without support. Nothing in the Act requires or will have the effect of requiring the Majors or any other producer or refiner to close any stations which they are presently operating. Nothing in the Act will prohibit the Majors or any other producer or refiner from building new stations in whatever form, design or manner in which they choose.

If any refiner or producer, for instance, desires to convert its stations from a full service station to a gasoline-only outlet,[4] nothing in the Act will prohibit it from doing so. Any Appellant may write into a dealer agreement any terms or conditions it desires in order to effectuate specific policies, such as how it wishes the station to be operated, including methods and, in most states, hours of operation. Appellants have done this in the past and this Act allows them to do so in the future.

There are only two exceptions: (1) Appellants may not set the retail price; and (2) Appellants may not force the dealer to stock their own brand of TBA (tires, batteries and accessories).

In all other aspects, they may engage in such experimentation or change as they desire without hindrance insofar as this Act is concerned.

Similarly, as the Majors cannot under these circumstances rationally argue that Paragraphs (B) and (C) place any burden whatsoever on interstate commerce, neither, as will be shown below, can the non-Major producers and refiners (hereinafter referred to as "Independents").

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[4] A full service outlet generally contains bays for repair work and incidental automobile maintenance such as oil changes and lubrication. In a full service station also, the operator generally will perform such services on the automobile as checking the oil and battery, adding water to the radiator and checking the air in tires. On the other hand, a gasoline-only outlet has no bays and the only service performed by the operator is putting gasoline in the automobile. Many gasoline-only outlets have equipment for self-service. However, full-service stations may also provide self-service.

With respect to the Independent Appellants, the same arguments apply except that in cases such as Ashland, but not in all, there would need to be a greater shift from company employee to dealer. However, as set forth above and contrary to the arguments made in Appellants' Briefs, this shift can be accomplished by the very simple expedient of substituting a dealer agreement for the employee's present employment agreement.

Independents argue, in effect, that it is imperative for their economic viability that they be allowed to continue their use of the company-operated retail outlet as a mechanism to fix the retail price of the gasoline. These Appellants also assert that somehow their efficiency will be impaired if their stations are required to be operated by dealers rather than employees.

That the Independents do not desire price competition is apparent from the recent verdict of a Maryland Federal jury in *United States of America* v. *Society of Independent Gasoline Marketers of America* (United States District Court for the District of Maryland) where Ashland Oil, Inc., Amerada Hess Corporation, Kayo Oil Company, and others were found guilty of fixing the price of gasoline in the State of Maryland, and, indeed, in the entire Eastern Region of the United States. As the evidence in that case revealed, there is no question that it is easier to fix the price of gasoline horizontally when outlets are employee operated than when they are dealer operated.

However, notwithstanding Appellants' desire, Congress and the Courts have long ago determined that competition and not price-fixing benefits the public

and constitutes the economic lifeblood of our nation.[5] It is this national policy, and the economic interests of its citizens, which the State of Maryland specifically seeks to further by this Act.

What the Independents in fact argue to this Court is that if they cannot in the future fix the price of gasoline sold at their retail outlets, somehow they will not be able to sell gasoline in the State of Maryland profitably and, therefore, must withdraw. This is palpable nonsense.

It fallaciously assumes, for example, that the economic self-interest of an independent dealer selling gasoline from an Appellant-owned outlet will be less than the Appellant's.

However, the retail dealer has been and must remain competitive in the geographic area in which he operates, and price accordingly. The retail dealer has no alternative; he must make his living from one specific outlet. Practically stated, this requires that he either sell gasoline or perish. To sell gasoline, the retail dealer must price at a level that will allow him to do so.

Appellants which operate their own outlet, on the other hand, operating as they do many outlets, can operate with some inefficiency and still make an overall profit. The independent dealer does not have that luxury.

Moreover, there is nothing in this Act which forbids any Appellant from either raising or lowering its

[5] See generally, *Northern Pacific Ry. Co.* v. *U.S.*, 356 U.S. 1 (1958), and Section "D," *infra*.

wholesale prices to the independent dealers. Traditionally, because of competition in the marketplace, when wholesale prices rise, it is the dealer that is ordinarily forced to absorb the most significant portion of that amount.[6]

On the other hand, where wholesale prices have been lowered, dealers will traditionally lower their retail prices in order to get a larger share of the business. Therefore, if Independents wish to have their product sold at lower prices than the Majors, they still have the obvious alternative of charging their dealers lower wholesale prices. The relationship between retail margins and wholesale prices is so well established in the gasoline industry that when the Federal Energy Office froze gasoline prices in 1973, it did so on the basis of dealer margins.

The undisputed testimony in two recent cases demonstrates that from a practical standpoint, the Independents' "burden" arguments cannot be supported. In *Crown* v. *Brice, et al.*, C.A. No. 75-0361-R (United States District Court for the Eastern Division of Virginia, Richmond Division), the testimony was undisputed that Crown began marketing in 1969 through only employee-operated outlets. By 1971, this method of marketing had resulted in unmitigated financial

[6] Proof is contained in statistics maintained by the Department of Energy which show a steady decrease in dealer margins since 1974 below the margin allowed them by Federal Energy Administration regulations. Significantly, during the same period of time refiners' margins have almost doubled. *See*, U.S. Dept. of Energy, Monthly Energy Review, October 1977; Federal Energy Administration, Preliminary Findings and Views Concerning the Exemption of Motor Gasoline from the Mandatory Petroleum Allocation and Price Regulations, August 1977.

disaster for the company. It then substituted independent operators for company employees. The result was a dramatic financial turnaround; Crown began making a profit with independent dealers at the same outlets which previously had been losing money under company operation. It was only after the independent dealers had built up the outlets so as to make them profitable that Crown began to take over these stations with its own employees.

The Independents' "burden" arguments may also be contrasted with the undisputed testimony in *Call Carl Inc. et al* v. *British Oil Corp. et al.*, Civ. No. 73-1059-Y (U.S. District Court, District of Maryland). BP in the middle '70's, effectuated a management decision to substitute a "Gas And Go" or "Gas Only" concept of marketing in many of its marketing areas. At the time, and because of the Maryland Act, BP determined that it would operate its Maryland "Gas And Go" stations with independent operators rather than with employees as it was doing in such stations outside the State of Maryland. The fact that the Act required it to operate such Maryland stations with dealers in no way deterred the change. BP instead devised a dealer lease and agreement for its independent dealers that provided additional economic incentives to those who were able to sell high volumes of gasoline, with corresponding built-in economic disincentives for dealers who sold lower gallonage of gasoline. Thus, BP utilized an incentive factor in its dealer agreements to achieve the desired result without the disadvantage to the public inherent in vertical price-fixing.[7]

[7] NCPR does not endorse this approach and believes it may constitute a violation of Federal antitrust laws. However, the fact remains it was done and has not been challenged.

The transparency of Appellants' "efficiency argument" is also revealed when that argument is examined in other than Appellants' theoretical vacuum. In the dealer-operated station, the dealer absorbs all labor costs, local and state taxes (other than property taxes), insurance and other costs incidental to the maintenance of the station. In addition, the independent dealer must absorb all pilferage which in many cases can be substantial.

Finally, in a dealer-operated station, the dealer is paying rental to the company for the use of that station which, of course, the company does not receive when it operates the station itself.

Under these circumstances, the argument that somehow there are economic efficiencies involved in an employee-operated station over a dealer-operated station is nebulous at best. Indeed, in this area it can be forcefully argued that the refiner and producer have less expense where an outlet is operated by an independent dealer than where it is operated by an employee. This is the primary reason why the Majors operate ninety-two percent of their stations in the State of Maryland with independent dealers.

What the independent producers or refiners are arguing is not that interstate commerce will be burdened, but rather that they will be burdened by not being able to fix retail prices. In a constitutional sense, the difference is crucial.

D. Paragraphs (B) and (C) of the Act Advance Substantial And Legitimate State Interests

Even assuming, *arguendo,* that Paragraphs (B) and (C) imposed some burden on interstate commerce, the

burden will be tolerated unless it outweighs the value of the state's reason for adopting the legislation. *Huron Portland Cement Co.* v. *Detroit,* 362 U.S. 440, 443 (1970).

Certainly there is no disagreement that the responsibility of a state in protecting its trade in commerce from unlawful restraints of trade is substantial. This is particularly true where a product like energy, so vital to the citizens of the state and the state itself, is involved.

Insofar as the Majors are concerned, the significant factor is that eight percent of their outlets are, in fact, employee-operated and that the number has been steadily increasing. The evidence presented at various Congressional hearings and the experience of Dealers overwhelmingly demonstrate that the Majors utilize employee-operated outlets for the purpose of controlling the prices of their independent dealer outlets in the same marketing area.

For instance, in a typical marketing area in which a company such as Exxon may have twelve dealer-operated outlets, it requires only one employee-operated outlet in that marketing area to control and influence the price which the independent dealers can charge in that marketing area.[8]

As pointed out by Appellants, price is a crucial factor in the retail sale of gasoline. While a retail dealer may deviate by one or two cents per gallon

[8] At the same time the Majors are able to hold the wholesale prices up because the dealer has no alternative source of supply. Therefore by this tactic, the squeeze is placed on the dealer instead of the wholesale price being lowered which in the longer run would cause lower prices for consumers.

from another station selling the same brand in the same trading area, its ability to deviate more than a minor degree in price is both limited and controlled by what another dealer selling the same brand in that area is charging.

Therefore, assuming the state has a legitimate interest in price competition in the sale of gasoline, it is certainly a valid exercise of that interest for a state to enact legislation that will prohibit the Majors from utilizing, as they have consistently in the past, such devices as company-operated outlets for controlling the retail price of their own retail dealers.

The Maryland Legislature did not promulgate this Act, and more specifically Paragraphs (B) and (C), in a factual vacuum. It had available to it countless hearings, reports and legislative studies to support its action. These hearings and studies clearly demonstrate that competition in the petroleum industry traditionally has occurred at the retail level and that vertical integration by refiners and producers is inimical to competition at the retail level and the public interest.[8a]

More recent materials reflect similar findings. For example, the House Subcommittee on Energy and Environment of the House Committee on Small Business has published a report[9] entitled "Problems of Small

[8a] For example, in his testimony before The Economic Matters Committee of the Maryland Legislature in March 1974, Vic Rasheed, Executive Director of The Greater Washington/Maryland Service Station Association cited pertinent sections of the Conference Report (93-628) on S 1570 (Energy Petroleum Allocation Act of 1973), which expressed U.S. Congressional concern with "downstream vertical integration of the major oil companies into the distribution and retail levels of the market."

[9] House Report No. 94-1762, 94th Cong., 2d Sess., dated October 20, 1976.

Retail Petroleum Marketers." The Report notes with concern that:

> "In a 24-month period between the beginning of 1972 and the end of 1974, the total number of retail gasoline service stations in operation in the United States decreased by more than 30,000 which is equivalent to about 15% of the number of such outlets. While the loss of this many business opportunities within the general economy would be disturbing, a decrease of this magnitude within just one sector of a single industry is disastrous. Even more alarming is the prediction that, if present trends continue, an additional 40,000 service stations will go out of business by 1980. The combined loss of 70,000 retail petroleum marketing outlets within an eight year period will mean that by 1980, one out of every four service stations which existed in 1972 will be permanently closed. This will not only mean that 70,000 businessmen have lost the opportunity to compete in our economic system, but that consumers will be deprived of 70,000 alternative sources of fuel and automotive repair services and of the competitive prices from the continued operation of those alternative sources of supply." *Id.* at 1.

The Report continues:

"The fact that integrated oil companies are selling gasoline through company owned and operated stations for an average of 5 cents a gallon less than their own branded lessee dealers has serious implications for the small business retailer. The branded dealers' market share has already fallen by 8% and they traditionally have not maintained their volume in a market that offers such price differences. This is particularly true in those instances where the refiner's company operated station sells gasoline under its own

brand name as does Exxon, Marathon, Hess, ARCO and others and thus directly competes on a brand name basis with its own branded dealers.

By concentrating on self-service and low retail gasoline prices, these refiners can undercut their own branded dealers. While many branded dealers believe they can survive the competition from the independent marketers and even from the secondary branded outlets, they strongly assert that they cannot endure price competition from their suppliers who market gasoline using the same brand name nor can they long endure the coercive economic pressures which can be exerted against them by a refiner upon whom they are dependent for their supply." *Id.* at 15.

The Subcommittee also pointed out in its Report that:

> "In order to protect their independent marketers, some European governments have adopted regulations which impose limitations on the number of stations a refiner can own and which separate the refiner from retailing. The United States has yet to adopt any policy which would effectively protect a small business dealer or independent marketer from the coercive economic power of refiners. As a result, refiner owned and operated stations are increasing their share of the market, and the individual dealers are being forced out of business.

It stated further:

> "While this in some instances may be temporarily providing the American consumer with lower priced gasoline, the ultimate effect will be the destruction of the independent segment of the retail sector of the petroleum industry. Since the independent marketer has historically supplied the price competition in the retail sector and since integrated companies have traditionally avoided

price competition, the existing restraints on retail prices will be gone forever." *Id.*

The Subcommittee's Findings, as embodied in its Report, are particularly enlightening here:

"CHAPTER IV.—FINDINGS

"The Subcommittee finds that the continued economic viability of both the independent branded and non-branded retail petroleum marketer is being jeopardized by the forward integration of refiners into the retail marketing sector of the petroleum industry. The Subcommittee believes that if this trend is allowed to continue, the small independent marketer will cease to be a competitive force and will continue to experience a decline in both numbers and market shares, which will not only be harmful to the interest of small business, but will also be detrimental to the best interests of the American consumer who will be harmed by the increased economic concentration in the petroleum industry which result from this forward integration be refiners."

Indeed, one of the Subcommittee's specific recommendations was:

"C. That the appropriate committees of Congress favorably consider legislation which would:

"(3) Prevent refiners from directly competing with the small business retailers they supply by prohibiting them from directly operating retail gasoline outlets or engaging in the direct retail marketing of gasoline."

See also, Hearings on H.R. 8117, the Small Business Petroleum and Petrochemical Marketers Protection Act of 1975.[10] At these hearings the Subcommittee

[10] Before the Subcommittee on SBA and SBIC Legislation of the House Committee on Small Business, 94th Cong., 1st Sess., July 22, October 30, November 13, December 11, 1975; February 24, March 2 and 3, 1976.

Chairman, the Honorable Neal Smith, stated that:

"There are sure to be periods of shortage in the future and unless something is done more small businessmen in gasoline marketing will be financially ruined. This fully integrated petroleum industry has overtones of an anticompetitive nature which destroy our competitive free market system and ultimately harm not only the small businessmen who are engaged in this business but also the consumer of petroleum products who will be forced to pay an inflated price due to the lack of competition."

Representative Smith concluded that the tool needed to enable small businessmen engaged in the marketing of petroleum and petrochemical products to remain viable entities and to promote competition is H.R. 8117:

"This bill would require the major oil refiners to dispose of their retail and wholesale outlets within 3 years. In this 3-year interim, they would be prohibited from expanding their wholesale and retail outlets."

The significance of these hearings and the proposed legislation is, of course, that after a careful review of the evidence, these Congressional Committees believe actual divestiture—one step beyond the divorcement required in the Maryland bill—to be absolutely necessary.

Under the proposed Federal legislation the refiners and suppliers would actually have to dispose of their retail properties. Under the Maryland Act, they are

allowed to keep their properties and need only operate them with independent dealers rather than employees.

See also Hearings on the Petroleum Marketing Practices Act,[11] which involved three bills, S. 19, S. 74 and H.R. 130, relating primarily to problems involved in gasoline distribution.

During the course of the hearings, Owen M. Johnson, Jr., Director of the Bureau of Competition of the Federal Trade Commission, testified:

> "Mr. JOHNSON. I have made a suggestion in my prepared text. I think in the last analysis all of these legislative suggestions are mere bandaids. I was interested to hear Professor Allvine say we are addressing the symptoms, not the cause. My suggestion is to consider seriously the divestiture of petroleum refining and marketing. Otherwise, the leverage problem is inherent both in the relationship of the refiner to the dealer who has to lease his premises from that refiner, and in the dual distribution situation where the refiner has the ability to locate directly operated stations in juxtaposition to his own lessee dealers."

See also Report of the Committee on the Judiciary of the United States Senate on S. 2387, Petroleum Industry Competition Act of 1976.[12] The Report stated in part:

> [W]e conclude that there is no economic advantage for society as a whole from vertical integration. As Exxon has persuasively demonstrated in the Wisconsin tax court proceedings, each functional level of the major integrated companies is fully capable of operating on its own.

[11] Hearings before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources, 95th Cong., 1st Sess., May 25, 1977.

[12] S. Rept. No. 94-1005, 94th Cong., 2d Sess., dated June 28, 1976.

> *The efficiencies claimed for vertical integration are, in reality, the advantages of market control and produce no public benefits.* The task of restructuring the major companies, while of considerable dimensions, involves problems no more difficult or complex than those regularly handled by the financial community. There is no reason why divestiture should in any way jeopardize the interests of shareholders, debtors, employees or pension holders." [Emphasis supplied]

The Report concluded:

> "Granted, divestiture provides no complete solution to the problem. It offers only a very reasonable chance for somewhat lower prices, but it is a measure we owe to the world to take."

Again, it should be emphasized that this report recommended total divestiture—as contrasted with the relatively simpler and less drastic divorcement solution embodied in the Maryland Act.[13]

Although Congress has recognized the problem, and although Federal legislation has been introduced which would in the national interest require not simply divorcement of retail operations but total divestiture of the properties involved, Congress has yet to act.

[13] See also Hearings of the Senate Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Vertical Integration in the Petroleum Industry (94th Cong., 1st Session, September 23, 26, October 29, 31, November 12 and 19, 1975); Hearings before the Senate Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Marketing Practices in the Gasoline Industry (92nd Cong., 1st Session, July 20, 21, 22 and 23, 1971); and Hearings before House Select Committee on Small Business on the FTC Industry Conference on Marketing of Automotive Gasoline. (89th Cong., 1st Session, May 3, 4, 5, 6, 10, 11, 12, 20 and July 19, 1965.)

Maryland, therefore, as have other states,[14] has taken action in an area of legitimate state concern, in which the Federal Government has not yet acted. Certainly in our federalistic form of government a state should be encouraged to pass legislation for the protection and welfare of its citizens rather than being forced to wait until such time as the Federal Government is disposed to act. This Court has historically encouraged States to do just that. See, *e.g.*, *Cooley* v. *Port Wardens,* 53 U.S. (12 How.) 299 (1851); *Parker* v. *Brown,* 317 U.S. 341 (1943). In *Parker,* this Court said:

> "When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. . . ." *Id.* at 362-3.

Here, of course, the state and national interests are concurrent, and the Federal Government has not yet preempted the field.

Finally, Appellants argue that this is class legislation establishing an "enclave" to protect gasoline dealers from competition. An enclave from whom? Dealers compete with other dealers in their own trading areas. There is nothing in this legislation which in any way could diminish the vigor of that

[14] During the last four years, the legislatures of thirty-three jurisdictions have adopted, considered, or had as pending business proposals which contain provisions similar to Paragraphs (B) and (C) of the Act.

competition. Indeed, if anything, it increases that vigor for the reasons set forth above and by adding to the numbers of competitors competing with each other.

The fact that a legitimate state interest is served by legislation which primarily concerns a specific class of competitors is of no consequence, and certainly does not render the legislation unconstitutional under the Commerce Clause. For example, most of the states have laws dealing with the problems of automobile dealers in their relationships with their suppliers —the automobile manufacturers.[15]

Such a Minnesota law was specifically upheld, despite the manufacturer's charge that it violated the Commerce Clause, in *Willys Motors* v. *Northwest Kaiser-Willys,* 142 F.Supp. 469 (D.Minn. 1956). The Court held that:

> "Laws 1955, Chapter 626 directly affects only manufacturers and dealers of automobiles, but it is reasonable to conclude that the statute has a public purpose when it attempts to alleviate an adverse economic condition directly affecting most of the 1,400 automobile dealers in the State of Minnesota and indirectly affecting thousands of others and a substantial segment of the economy. A law which seeks 'protection of a basic interest of society' will be upheld. Home Building & Loan Ass'n v. Bla...ell, 290 U.S. at page 445, 54 S.Ct. at page 242."

In *Willys* the Court also cited with approval the decision of the Wisconsin Supreme Court in *Kuhl Mo-*

[15] In addition, many states have laws prohibiting manufacturers of beer from engaging in the wholesaling of beer within a state. Such laws to our knowledge have never even been successfully challenged.

tor Co. v. *Ford Motor Co.*, 270 Wis. 488, 71 N.W. 2d 420, 427, which held that:

> "The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same being a legitimate exercise of the police power."

See also *Ford Motor Co.* v. *Chester R. Pace, etc., et al.*, 355 S.W. 2d 420 (1960), where the Tennessee Supreme Court discussed the various state automobile dealers' statutes and concluded:

> "It is not at all unreasonable for us to believe that the Legislature had the purpose in mind in enacting this legislation to protect the public safety, health, and/or public morals of its people. When we thus have determined that the legislation is reasonable, certainly under the Section of our Constitution hereinbefore referred to and the 14th Amendment to the United States Constitution, this legislation is not unconstitutional merely because it is attempting to regulate the motor vehicle or automobile industry, its dealers, salesmen, etc."

In upholding each of these state statutes, the respective Court have emphasized the importance of transportation to a state. Equally important are laws involving an industry which provides the fuel with which those vehicles operate.

One can understand Appellants' desire to be allowed to fix the price at which they sell their gasoline at retail outlets. However, there is an irreconcilable conflict between that desire and the legitimate desire of the State that its citizens purchasing gasoline be assured the maximum benefits of competition. It is the undeniable state interest, as expressed in the challenged legislation, and not Appellants' desire, which is entitled to prevail here.

CONCLUSION

For the foregoing reasons, the decision of the Maryland Court of Appeals should be sustained, and the constitutionality of Paragraphs (B) and(C) of the Act specifically reaffirmed by this Court.

Respectfully submitted,

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